

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS W. SHELLEY,

Plaintiff,

v.

MICHAEL J. LECHLEITNER, RANDELL
HOENISCH, GARY A. SCHNECK,
DETECTIVE MILHAUSEN and GRAUDEN,
CHAD BILLEB, TROY PAULS, JENNY
HOLZ, CAPTAIN SLEETER and
VERCIMACK, OFFICER GOFF, DEPUTY
SCHEFFLER and ANDY BUSS, MICHAEL
WILLIAMS, UNKNOWN REGION SIX
AGENT(S), CHRISTOPHER L. WITHERS
and his AGENT and his AGENT'S
SUPERVISOR,

Defendants.

ORDER

08-cv-647-bbc

This is a proposed civil action for monetary relief, brought by plaintiff Thomas Shelley under 42 U.S.C. § 1983. Plaintiff's claims arise from his January 11, 2008 arrest and subsequent interrogation. In a September 22, 2010 order, I reopened the case, which had been stayed under Wallace v. Kato, 549 U.S. 384, 393-94 (2007), because plaintiff's criminal proceedings had concluded. However, I dismissed plaintiff's complaint because he

did not include enough detail to satisfy Rule 8 of the Federal Rules of Civil Procedure. Now plaintiff has filed an amended complaint. He now names as defendants Gary Schneck, Michael Lechleitner, Chad Billib, Troy Pauls, Jenny Holz and John Does (the John Doe defendants will be added to the caption). The remaining defendants will be dismissed from the case.

Because plaintiff was a prisoner at the time he filed his original complaint, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After reviewing plaintiff's complaint, I conclude that he states a claim against defendants for keeping him from receiving a probable cause hearing within 48 hours of his arrest. (As I noted in the order entered on September 22, 2010, I am not deciding at this time whether plaintiff's claim can be decided without impugning his state court conviction; it will be up to defendants to prove that the claims are barred under Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), if they have reason to think that they are.) Also, I will give plaintiff a chance to supplement his other claims before deciding whether he may proceed on those claims.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On January 11, 2008, plaintiff Thomas Shelley was arrested in relation to two deliveries of non-narcotic drugs on January 10 and 11, 2008. The arrest was made without a warrant. Defendant Gary Schneck failed to read plaintiff his Miranda rights. Defendant Chad Billeb denied plaintiff use of the phone on January 11, 2008, so he was unable to contact his attorney. After plaintiff asked for an attorney, defendants Troy Pauls and Jenny Holz failed to stop interrogating him. All of the defendants violated his rights by waiting until 69 days had passed to bring him before the court. His initial appearance was March 20, 2008.

DISCUSSION

A. Fourth Amendment Right to Probable Cause Determination

Plaintiff claims that he was arrested without a warrant and then not brought before a court for 69 days. In Wisconsin, there are two types of hearings that are held shortly after a person's arrest. One hearing is a probable cause hearing and the other is an initial appearance. A person who is arrested *without a warrant* is entitled to a probable cause hearing within 48 hours of the arrest. Gerstein v. Pugh, 420 U.S. 103 (1975) (when person is

arrested without a warrant, Fourth Amendment requires prompt judicial determination of probable cause before person may be subjected to extended pretrial detention); Willis v. City of Chicago, 999 F.2d 284, 287 (7th Cir. 1993). In County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Court defined “prompt” to mean that a probable cause hearing should take place within 48 hours of a suspect’s arrest barring a bona fide emergency or other extraordinary circumstance. Id. at 56.

Although plaintiff couches his claim in terms of being denied an initial appearance (which is not subject to the 48-hour rule) rather than a probable cause hearing, he alleges that he was not brought before the court for any kind of hearing for 69 days. This is enough to infer that plaintiff did not receive a probable cause hearing for over 48 hours, so I conclude that he has stated a Fourth Amendment claim against defendants.

B. Failure to Provide Miranda Warnings and Failure to Provide Counsel

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that before police officers may interrogate a suspect that is in custody, they must inform the suspect of his right to remain silent and his right to an attorney. In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that once a suspect expresses his desire to speak with police in the presence of an attorney, officers may not continue to interrogate the suspect until an attorney is present. In Sornberger v. City of Knoxville, Illinois, 434 F.3d 1006, 1024 (7th

Cir. 2006), the court recognized that if a suspect's statement were used against him in a "criminal case," a Miranda violation was a violation of a plaintiff's constitutional rights and therefore actionable under § 1983. However, if the statement is not used against the suspect in a criminal case, there is no violation. Id. at 1024-25. Because the right to counsel announced in Edwards is derived from the holding in Miranda, I must conclude that § 1983 liability attaches for an Edwards violation only if statements are used against the suspect in criminal proceedings.

In his amended complaint, plaintiff alleges that defendant Schneck failed to read him his Miranda rights, and that defendants Pauls and Holz violated Edwards by failing to stop interrogating plaintiff after he asked for an attorney. However, plaintiff does not allege whether statements he made during his interrogation were used against him in his criminal proceedings. Thus it is unclear whether plaintiff has stated a claim upon which relief can be granted. I will give plaintiff an opportunity to further detail his claim. Plaintiff will have until December 20, 2010 to submit a supplement to his amended complaint containing allegations explaining whether statements made in his allegedly unlawful interrogation were used against him at trial.

C. Sixth Amendment Right to Telephone Counsel

Next, plaintiff alleges that defendant Chad Billeb refused to let plaintiff use the

telephone to call an attorney. Restrictions on a detainee's telephone privileges that prevent him from contacting his attorney may violate the Sixth Amendment right to counsel. Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995); Tucker v. Randall, 948 F.2d 388, 390-91 (7th Cir. 1991). However, the right to counsel does not attach until “at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” Kirby v. Illinois, 406 U.S. 682, 689 (1972); United States v. Karr, 742 F.2d 493, 495 (9th Cir. 1984). Plaintiff states that he was arrested on January 11, 2008 and then not allowed to call an attorney that same day. He does not explain how long he was prohibited from calling an attorney or whether he had been formally charged at that time. Therefore, as with his Fifth Amendment claims, plaintiff will be given a chance to supplement his complaint. He will have until December 20, 2010 to submit a supplement to his amended complaint containing allegations explaining how long he was prohibited from calling an attorney and whether he had been formally charged at that time.

ORDER

IT IS ORDERED that

1. Plaintiff's complaint is DISMISSED as to defendants Randall Hoenisch, Detectives Milhausen and Grauden, Captains Sleeter and Vercimack, Officer Goff, Deputies

Scheffler and Andy Buss, Michael Williams, Unknown Region Six agent(s), Christopher L. Withers, his agent and his agent's supervisor.

2. Plaintiff is GRANTED leave to proceed on his claim that defendants Gary Schneck, Michael Lechleitner, Chad Billib, Troy Pauls, Jenny Holz and John Does kept him from receiving a probable cause hearing for over 48 hours. Defendants John Does will be added to the caption.

3. Plaintiff may have until December 20, 2010 to submit a supplement to his amended complaint providing further explaining (1) whether statements made in his allegedly unlawful interrogation were used against him at trial; and (2) how long he was prohibited from calling an attorney and whether he had been formally charged at that time. If plaintiff fails to supplement his amended complaint by December 20, 2010, I will dismiss plaintiff's Miranda, Edwards and right to contact an attorney claims without prejudice.

4. Service of the complaint on defendants is STAYED pending receipt and screening of plaintiff's supplement to the complaint.

Entered this 7th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

